NO. 21126

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

NO. 21126

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOHN K. VAN de KAMP,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

NO. 21126

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID A. HILL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

The appellant, David A. Hill, was indicted on February 23, 1966, by the Federal Grand Jury for the Southern District of California, Central Division.

This indictment, which was in One Count, charged that:

"On or about November 10, 1965, in Los Angeles County, within the Central Division of Southern District of California, defendant DAVID A. HILL and Andrew H. Miller, with intent to defraud the United States, knowingly sold and facilitated the

sale to Agent Charles H. Restow of the Federal Bureau of Narcotics, 1,497.00 grams of marihuana, which said marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law." 1/

On March 25, 1966, before the Honorable Francis C. Whelan, United States District Judge, jury trial commenced, and appellant, on March 29, 1966, was found guilty as charged in the indictment. 2/ On April 28, 1966, appellant was sentenced to imprisonment for a period of five years [C. T. 24, 25].

Notice of Appeal was filed on May 6, 1966 [C. T. 26].

The District Court had jurisdiction of the case under Title 28, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, United States Code.

II

STATUTE INVOLVED

The One-Count Indictment was based upon Title 21, United States Code, Section 176(a), which provides in pertinent part as follows:

1/ C. T. 2, "C. T." refers to Clerk's Transcript of Proceedings.

2/ R. T. 146, 162, "R. T." refers to Reporter's Stenographic Transcript.

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought in to the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. . . ."

III

STATEMENT OF FACTS

At about 3:15 P. M. on November 8, 1965, Agent Charles Restow of the Federal Bureau of Narcotics was introduced to the

appellant Hill, in Hermosa Beach, California. He was introduced by an informant, named Dennis Snowdon [R. T. 51-53].

During this meeting, appellant Hill told Agent Restow that "he (Hill) could furnish marihuana in quantities, but that he would have to contact a partner of his who was involved in the business" [R. T. 54]. Hill was asked by Agent Restow when such a sale could take place and Hill answered that they could go over right then [R. T. 54]. Thereupon, Hill alighted from the booth in which they were sitting and stated, "I'm going to call my partner" [R. T. 54].

At approximately 4:00 P. M. on that same November 8th, one Andrew H. Miller arrived and was introduced to Agent Restow by appellant Hill [R. T. 54]. Restow stated that Hill had told him he would be able to purchase some marihuana. Miller answered that "Yes, it could be arranged" [R. T. 55].

Agent Restow then asked Miller what the price would be, whereupon Miller turned to appellant Hill and asked, "What did you tell him?" [R. T. 55]. "I told him $125 a kilo", Hill responded.

Agent Restow then handed $250 of Government funds to Miller, who counted it, and then handed $30 of this money to appellant Hill for his share in the transaction [R. T. 56].

The next time Agent Restow met with appellant Hill and Andrew Miller was at 9:45 in the evening of the same day. This meeting took place at the Zig Zag Cafe, and was prearranged for the delivery of the marihuana [R. T. 56, 58]. However, Miller told Restow that the marihuana could not be delivered until the following morning at which time appellant Hill would be out of

town [R. T. 57]. After this evening meeting on November 8th, Agent Restow had no further contact with appellant Hill [R. T. 58].

On the morning of November 9th, Agent Restow attempted to meet with Andrew Miller, however, Miller was late in arriving, and when he finally came Restow had already left [R. T. 58, 75].

The following day, November 10th, at approximately 11:00 A. M., Andrew Miller telephoned and then met with Agent Restow in Torrance, California, and delivered to him what was introduced at trial as Government's Exhibit One, namely, 1,452 grams of marihuana [R. T. 58-60, 50-51]. This marihuana was "unmanicured", wrapped in foreign packaging, and typical of the marihuana that comes from the interior of Mexico and Baja California, in the expert opinion of Agent Restow [R. T. 114-118].

On cross-examination of Agent Restow at the trial, counsel for the appellant asked Agent Restow how he had come to know the informant, Dennis Snowdon. Agent Restow answered that he had been conducting an investigation with the St. Louis office of the Federal Bureau of Narcotics regarding sales of marihuana in that city and that in so doing he had occasion to interview the informant Snowdon. Agent Restow told Snowdon that the Federal Bureau of Narcotics was interested in the source of supply for the St. Louis case. Snowdon, who was not under indictment and against whom no prosecution was pending, set up a meeting for Agent Restow to make a purchase from appellant Hill. This was the November 8th meeting between the appellant and Agent Restow [R. T. 61-64].

Andrew Miller testified at the trial as a witness for the

United States. He had known appellant Hill for approximately six months and they had enjoyed a business relationship with each other. Miller testified that they were "partners", partners "in the sale of narcotics" [R. T. 72-73]. Miller further testified that it was Hill who had set the price for the sale of marihuana which was the subject of prosecution [R. T. 85].

When asked on cross-examination what he had done in order to obtain the marihuana involved in this case, Andrew Miller answered, "I merely went after it" [R. T. 80].

Of the $250 in Government funds which was paid for Exhibit One, $200 represented payment for the marihuana, $20 was retained by Andrew Miller, and $30 went to appellant Hill [R. T. 75-76].

Appellant Hill did not choose to testify.

IV

ARGUMENT

A. APPELLANT HAD SUFFICIENT "POSSESSION" OF THE MARIHUANA CHARGED TO INVOKE THE STATUTORY PRESUMPTION OF KNOWLEDGE OF ILLEGAL IMPORTATION.

Appellant contends, as basis for his first Specification of Error, that there is no proof of either actual or constructive possession of the marihuana charged such as would allow the Government to rely on the statutory presumption relating to

importation, as found in 21 U. S. C. §176(a).

Appellee certainly concedes that there was no proof of actual possession of the marihuana by appellant Hill. There was, however, a plethora of uncontradicted facts clearly showing that appellant Hill had constructive dominion and control over the marihuana, which he held jointly with his "partner" Andrew Miller.

This Court has, on several occasions held that possession may be constructive and joint, as well as physical or exclusive, and still raise the statutory presumption provided in 21 U. S. C. §176(a), as well as in the analogous narcotics section 21 U. S. C. §174. 3/

In Anthony v. United States, 331 F. 2d 687 (9 Cir. 1964), this Court held that constructive possession will support the presumption of 21 U. S. C. §176(a) in a prosecution for selling marihuana. In so ruling, the court cited Cellino v. United States, 276 F. 2d 941 (9 Cir. 1960) wherein a similar question was raised. In Cellino the appellant was found to have "facilitated" a sale of heroin by his co-defendant Bruno to a deputy sheriff. The opinion noted, at page 343, that as to appellant Cellino:

> "The primary question on this appeal is whether the United States may rely upon the statutory presumption arising from possession to establish that the heroin was imported contrary to

---

3/ Appellee will rely in this brief on cases interpreting the word "possession" used in both statutes, just as every one of the cases cited in appellant's opening brief involves 21 U. S. C. §174 rather the statute under which appellant was convicted, 21 U. S. C. §176(a).

law and that appellant knew it was so imported. . . .

"It is not disputed that Bruno had possession of the narcotics. Appellant contends however, that there is no evidence that he ever had possession, and that the Government may not rely upon possession in Bruno to prove illegal importation or knowledge thereof as to appellant, since the presumption arises only where 'The defendant is shown to have or have had possession of the narcotic drug."

The court citing Title 18, U.S.C. §2 and inter alia, United States v. Cohen, 124 F.2d 164 (2 Cir. 1941), Bernstein v. United States, 315 U.S. 811, accepted the Government's contention that:

" . . . the possession required by §174 need 'not be that of the person convicted' and upon proof that the appellant 'facilitated' or 'aided and abetted' in the sale, possession in his co-defendant Bruno was then sufficient to make the presumption effective against appellant."

and at page 946 held:

" . . . the circumstantial evidence of dominion and control is sufficient to justify a finding by the jury of constructive possession in appellant within the meaning of Section 174."

In the Cohen case cited by this Court in Cellino, supra, the Second Circuit held at page 165:

"Under the first statute we have quoted [21 U.S.C. §174] it was only necessary to show possession of the narcotics to establish guilt and under the second statute [18 U.S.C. §2], making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental."

The word "facilitates" as used in Title 21 U.S.C. §174, "in any manner facilitates a sale", has been held by this Court in Pon Wing Quong v. United States, 111 F.2d 751 (9 Cir. 1940), at page 756 to mean:

" . . . the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.' "

Cited with approval in Bruno v. United States, 259 F.2d 8 (9 Cir. 1958), cert. den. 333 U.S. 832.

In McClure v. United States, 332 F.2d 19 (9 Cir. 1964), appellant McClure was present in co-defendant Gaxiola's residence at the time Gaxiola physically delivered heroin to one Hopping, an undercover informant of the Federal Bureau of Narcotics, and

received $100 from Hopping therefor. The only other evidence connecting McClure with this transaction was the subsequent dividing of the purchase money by Gaxiola with appellant McClure. On appeal, McClure argued that the presumption of 21 U.S.C. §174 was inapplicable to him "because he was not shown to have had possession of the narcotics involved" in this transaction. This Court stated at page 23:

> "Possession sufficient to raise the presumption can be either actual or 'constructive.' Actual physical contact with the drugs is not required; rather possession consists of 'having [the drugs] in one's control or under one's dominion.' . . . (footnote citation omitted) The power to control can be shared by others, and it can be shown by direct or circumstantial evidence."

This opinion was consistent with the earlier decision in Mullaney v. United States, 82 F.2d 638 (9 Cir. 1936) where although there was no evidence of appellant Ethel Mullaney ever having physical custody of the narcotics involved, or actually participating in the charged sale, nevertheless the circumstances of marked money being found in the bed where she slept with her co-defendant husband, and that she was in such room at the time the undercover informant entered the residence to purchase heroin from her husband, although he did not enter the room, was held sufficient evidence for application of the statutory presumption of 21 U.S.C. 174 and also sufficient evidence to have permitted the case to go to the jury.

See also:

Rodella v. United States, 286 F. 2d 306 (9 Cir. 1960), cert. den. 365 U. S. 889 (1961).

The decision of this Court in Hernandez v. United States, 300 F. 2d 114 (9 Cir. 1962), upon which appellant Hill relies so heavily, is not to the contrary. An extensive review of cases involving possession was there made, and the court stated:

> "The function of 'possession' in the statutory scheme is to shift to the defendant the burden of identifying the legitimate source of the narcotic drugs, if, indeed they were not illegally imported. This statutory rule of evidence . . . (footnote reference omitted) rests upon (1) the rational relationship between 'possession' of narcotic drugs by the defendant and knowledge on his part that a substance which is normally imported and rarely imported legally, . . . (footnote reference omitted) was in fact imported contrary to law, plus, (2) as a corollary, the consideration that the 'possessor' of the narcotic drugs has so much more convenient access to the facts as to their source that it is not unreasonable to require him to come forward with an explanation . . . (Footnote reference omitted.) Clearly, both rational relationship and relative convenience support an interpretation of 'possession' which extends the presumption to all who have dominion and control over particular narcotic drugs."

In finding inadequate basis to conclude "possession" on the part of appellant Hernandez, this Court was faced with a record where the trial judge sitting without a jury had specifically found:

> " . . . that neither illegal importation of the heroin nor personal knowledge by the defendant that the heroin was illegally imported had been proved. The court further found that it had not been proved that the defendant personally had either physical possession of the heroin or power to control it."
> (Emphasis added.)

It was noted in footnote 14, at page 120:

> "If the trial court had found that defendant shared control over the heroin, the defendant then would have had constructive 'possession' of the heroin and the statutory presumption would have been brought into play under the decisions earlier referred to."

In substance, it was the conclusion of the court that where the principal defendant, found to be a possessor of heroin, is not on trial, because a fugitive, and the appellant is specifically found by the trier of fact not to have had either actual or constructive possession of the heroin involved, then the possession of such other person cannot be imputed to such an appellant. The instant case involves no such determination by the trier of fact of lack of possession.

In the trial of appellant Hill, it was uncontested that he was the "partner" of Andrew Miller, and that Miller was the one who made the actual delivery. Appellant Hill referred to Miller more than once as his "partner" before calling him to obtain the marihuana [R. T. 54]. Miller himself stated that he and Hill were partners in the sale of narcotics [R. T. 73].

Further, it is uncontradicted that appellant Hill, not Miller, set the price for the instant sale of marihuana [R. T. 85].

It is also uncontradicted that appellant Hill received more money for this transaction than did his partner, Miller [R. T. 75-76], and that Miller's only participation was that he, in his words, "merely went after it" [R. T. 80].

If it is true that these facts permit even a possible inference of control over the marihuana, then, in the view of the Ninth Circuit, "the possible inference becomes a proper inference of the fact of possession -- of dominion and control over the marihuana -- and once made by the trier of fact, and determined by him to be substantial, clear and convincing proof, such a determination of fact is binding on (this Court). Williams v. United States, 9 Cir. 1961, 290 F. 2d 451." Anthony v. United States, supra.

B. THE JURY WAS PROPERLY INSTRUCTED THAT THE ACCUSED HAD TO HAVE "POSSESSION" BEFORE THE STATUTORY PRESUMPTION COULD ARISE.

Appellant's second argument seems to be that the court, in its instructions, failed "to exclude from the jury the possibility that appellant might have joint control of the marihuana merely because he either aided Miller or was engaged in a common plan with Miller." (Appellant's Opening Brief p. 17.)

At no time did the trial judge ever instruct the jury that if they found appellant merely to have aided Miller or engaged in a common plan with him the statutory presumption could arise without finding actual or constructive possession on the part of the appellant. On the contrary, the court specifically instructed that the statutory presumption could be raised only if the accused was shown to have had possession of the marihuana. The court stated:

"To aid enforcement, Section 176(a) of Title 21, United States Code, further provides:

" 'Whenever on trial for a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.'

"However, this statute does not change the

fundamental rule that the accused is presumed innocent until proved guilty beyond a reasonable doubt; nor does it impose upon the accused any burden or duty to produce proof that the narcotic drug was lawfully imported, or any other evidence.

"As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. What the statute means is that upon a trial for a violation thereof, if the jury should find beyond a reasonable doubt that the accused has had possession of the marihuana as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the marihuana was imported or brought into the United States of America contrary to law, and to draw the further inference and find that the accused had knowledge that the marihuana was imported or brought in contrary to law. . . .

* * * *

"In connection with any explanation offered for possession of marihuana, you are reminded that in the exercise of constitutional rights the accused need not testify. Possession may be explained to the satisfaction of the jury through other circumstances

and other evidence in the case, independent of the testimony of the accused." [R. T. 153, 154]. (Emphasis added.)

The court also instructed:

"In this case you are concerned only with the guilt or innocence of the defendant David A. Hill.

"Four essential elements are required to be proved in order to establish the offense charged in the indictment. First, that the defendant sold and facilitated the sale of marihuana as alleged -- sold or facilitated the sale of marihuana as alleged; second, that the marihuana had been imported or brought into the United States contrary to law; third, that the defendant knew the same to have been imported or brought into the United States contrary to law; and, fourth, that the defendant did such act knowingly and with intent to defraud the United States." 4/ [R. T. 150].

Thus, the question presented to the jury in the instructions of the court was that of the accused's possession. Furthermore, the trial judge meticulously defined possession so that there could

---

4/ As the trial court said, appellant's proposed instruction No. 3, C. T. 20, states nothing more than the instructions quoted above [R. T. 105].

be no mistake, and then added:

> "If the jury should find beyond a reasonable doubt from the evidence in the case that the accused either alone or jointly with others had actual or constructive possession of the marihuana described in the indictment, then you may find that such was in the possession of the accused within the meaning of the word 'possession' as used in these instructions." (Emphasis added). [R. T. 149].

If, after all this, counsel for the appellant still felt the jury could convict without first finding that the accused had actual or constructive possession of the marihuana, he could have asked for special findings of fact, which he did not see fit to do.

In summary, the instructions, taken as a whole, fully and correctly communicated to the jurors that they had to be convinced, beyond a reasonable doubt, that the accused had possessed the marihuana, either actually or constructively, before the statutory presumption could be invoked. Clearly, the requirements of justice were satisfied.

CONCLUSION

A review of the record indicates no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

JOHN K. VAN de KAMP,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.